FOR ARGUMENT

IN THE

Supreme Court of the United States

October Term, 1979

No. 77-1546

WILLIAM H. STAFFORD, JR., STUART J. CARROUTH, and CLAUDE MEADOW,

Petitioners,

—v.—

JOHN BRIGGS, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF FOR THE RESPONDENTS

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STATEMENT

This case was argued on April 24, 1979, in tandem with Colby v. Driver, No. 78-303.

The Court by order of May 4, 1979, restored both cases to the calendar for reargument. Respondents submit this supplemental brief to respond to the Supplemental Brief for the Petitioners (hereinafter Pet. Supp. Br.) dealing with a decision of the Court of Appeals for the Second Circuit rendered on September 10, 1979. Blackburn v. Goodwin, No. 78-7592 (2d Cir. 9/10/79). (Copy annexed to Pet. Supp. Br. as Appendix A). In Blackburn, the Second Circuit held that 28 U.S.C. §1391(e) does not apply to a personal damage action against a United States official in his individual capacity. A Petition for Rehearing and Suggestion for Hearing En Banc was filed in Blackburn, supra, on September 24, 1979. At the time this brief was written, it had not yet been ruled on by the Second Circuit.

ARGUMENT

I

IN BLACKBURN THE SECOND CIRCUIT (a) OMITTED ANY MENTION OF SIGNIFICANT PORTIONS OF LEGISLATIVE HISTORY, (b) FAILED TO DEAL WITH THE LANGUAGE OF THE STATUTE, AND (c) IGNORED THE FACT THAT PUBLIC LAW 87-784 DEALS WITH TWO DISTINCT STATUTES.

A. The omission of any mention of significant parts of the legislative history.

While the Second Circuit purports to base its decision on the legislative history of Section 1391(e), there is a striking omission in its opinion; namely, that two deputy attorney generals and a Justice Department spokesman alerted Congress to the question of personal damage actions against government officials and that the reports of Congress reflect that Congress was aware of the counsel and advice it was receiving from the Department of Justice, accepting some

of the recommendations and rejecting others, most significantly, those recommendations with respect to personal damage actions against government officials. Furthermore, a third Deputy Attorney General, addressing the public law contemporaneously with its enactment, made clear that he understood that the Congress meant to include personal damage actions against government officials within the coverage of Section 1391(e).

For the Second Circuit to have totally omitted the foregoing from its discussion of legislative history in Blackburn undermines the entire basis of its opinion.[1/]

1/ There is literally not a word mentioned in the Blackburn opinion about the letter of Deputy Attorney General Walsh although it was attached to the first House Report, No. 1936 and it is discussed in the Government's amicus brief filed in this case at pp.26-27, copies of which were filed in the Second Circuit in the Blackburn case. The Second Circuit also failed to even mention the letter of Deputy Attorney General White although it was prominently mentioned in the opinion of the District of Columbia Circuit in this case. (Pet. App. at 6a-7a, 6a n.23) and in that of the

(Footnote continued next page)

In our main brief at pages 52-103 we developed step by step the aspects of the legislative history with which the Second Circuit failed to deal. The Second Circuit's omission of such a large part of the legislative history, after the history was signalled by the District of Columbia Circuit in this case and by the First Circuit in Driver, supra, is incomprehensible.

(Footnote continued)

First Circuit in Driver v. Helm, 577 F.2d 147, 153 (1978) cert. granted sub nom Colby v. Driver, No. 78-303 (January 15, 1979). The Second Circuit also ignores the Katzenbach memorandum issued immediately after the enactment of the statutes through that too was before that court.

The only reference in Blackburn to the Justice Department position appears in footnote 6 (Pet. Supp. Br. at 9A-10A n.6). There reference is made to the testimony of Donald B. MacGuineas. The Second Circuit quite properly points out that Mr. MacGuineas objected to including personal damage actions against federal officials. However, the Second Circuit fails to mention that after receiving the plea from Mr. MacGuineas, the bill was redrafted to include the very language Mr. MacGuineas had objected to and warned about.

B. The Second Circuit failed to deal with the language of the statute.

Early in its opinion, directly after setting forth the wording of Section 1391 (e), the Second Circuit states:

> Since this is a civil action brought against an officer or employee of an agency of the United States and plaintiffs all allege residence in the Southern District of New York, and since service, although not made personally in the Southern District, was in conformity with the statute, it would appear at first blush that Judge Haight reached a proper conclusion and indeed one previously reached by two courts of appeals in other circuits. Blackburn, Pet. Supp. Br. at 5A.

Nowhere else in its opinion does the Second Circuit confront the actual wording of the statute. Its opinion is totally based on what it preceives to be the intent of Congress, but it never acknowledged that Congress in enacting two sections of law at the same time, chose language for one section, the mandamus section, that clearly

excluded damage actions (Section 1361) and then proceeded to use broader and more encompassing language for the other section (Section 1391(e)) which clearly included damage actions. The Second Circuit simply does not address the statutory language analysis of the other two circuits. See Resp. Main Br. at 44-45.

The letter of Deputy Attorney General White and Congress's reaction thereto is discussed in Respondents' Main Brief at 68-75. In view of the fact that he specifically brought the damage action problem to Congress's attention in terms of the language of the statute (Id. at 11a) and suggested language which would have narrowed the section of the public law which became Section 1391(e) so as to exclude such actions[2/], it is clear that

2/ His suggestion was that instead of the phrase "civil actions" the Congress should employ the following language:

(Footnote continued next page)

Congress did not intend Section 1391(e) to be narrowly applied and chose language to reflect its intent. Blackburn fails to address the elementary question of why, if Congress didn't want to cover damage action, it insisted on maintaining, against the advice of the Deputy Attorney General, broad language which clearly encompasses damage actions.

C. In Blackburn, the Second Circuit ignored the fact that Public Law 87-784 deals with two distinct statutes.

The error of the Second Circuit in Blackburn flows from its failure to treat the two sections of the single public law as dealing with two distinct issues; a) Section one deals with mandamus type actions, and b) Section two deals with

(Footnote continued)

"a civil action for judicial review of agency action under section 10 of the Administrative Procedure Act (60 Stat. 243, §10 5 U.S.C. §1009)" Resp. Main Br. at 14a.

venue and personal jurisdiction in all civil actions against government officials acting officially or under color of law. Respondents' position is based on the indisputable fact that the public law contains two sections and that at times members of the legislative and executive branches were addressing only one of the two sections. This was true with respect to parts of the Senate Report, of both House Reports, of President Kennedy's statement, and of some communications from the Department of Justice.

The legislative history, including all three Congressional reports and the comments of the Department of Justice and the Congressional responses thereto, is all totally comprehensible once it is recognized that the single public law deals with two distinct statutes.

It is not difficult to trace the origin

of the Second Circuit's confusion about the relationship of the two statutes to each other because the Blackburn opinion articulates its reliance on the analysis in an earlier Second Circuit opinion, Natural Resources Defense Council, Inc. v. TVA., 459 F.2d 255,258 (2d Cir. 1972)[3]. In TVA, supra, the court found error in the way the lower court had read the plain words of Section 1391(e) literally rather than reading Section 1361 and Section 1391 (e) as a "whole statute" to be restricted by its legislative history. Respondents do not object to reading the two statutes together as long as one isn't read to

3/ In TVA the court said, "§1391(e) was not the whole statute which Congress enacted in 1962. It was the second section, the first being what had been codified as 28 U.S.C. §1361, and the two must be read together." Id. at 258 quoted in Blackburn Pet. Supp. Br. at 6A. (Emphasis supplied by court in Blackburn).

limit the other as the Second Circuit does in Blackburn and TVA. Congress did not intend such a limitation.

At the time of the presentation of TVA, supra, some of the most critical documents which reveal Congress's intent in passing the statutes had not been made available and were not before or considered by the Second Circuit[4].

The most revealing part of the legislative history not before the Second Circuit at that time is the Katzenbach memorandum. While it was not written until right after the statutes were passed[5], it

4/These include the transcript of the Hearings before the House Committee (see Resp. Main Br. at 60 n.18) and the Katzenbach memorandum (see Resp. Main Brief at 81 n.27).

5/ To that extent the Katzenbach memorandum is not a formal part of the legislative history. However, it is the single contemporaneous document which explains the full understanding of the Department of Justice and the President on what had transpired in Congress and of what the President thought he was signing.

clearly reveals what the struggle between Congress and the Department of Justice had been about and how the various parts of the legislative history are all comprehensible once it is understood that two distinct statutes were being discussed.

The Katzenbach memorandum - unexcerpted copies of which have been lodged with the Court - is structured in two sections. Section 1 (dealing with Sec. 1361) is entitled "Authority of district courts to grant mandatory relief." Under this heading there are 8 separate sub-headings labelled A to H, suggesting matters with which U.S. Attorneys should concern themselves, e.g., "A. Nondiscretionary nature of official duty involved" ... "D. Failure to exhaust administrative remedy" ..."F. lack of indispensible party" etc.

There then appears a separate section (dealing with Section 1391) entitled: "Extension of venue of suits against Govern-

ment officials and agencies." Under this heading there are 5 separate subsections labelled A to E one of which, D, incorporated by reference some, but not all, of the paragraphs which dealt with the mandamus part of the Public Law.

Included in the paragraphs dealing with Section 1391(e) is paragraph B entitled: "The venue provision is applicable to suits against government officials and agencies for injunctions and damages as well as suits for mandatory relief."[6/]

Mr. Katzenbach, who was responsible for the drafting of President Kennedy's statement, at the time of signing the law[7/] plainly

6/ This paragraph is quoted in full in Resp. Main Brief at 17a.

7/ The proposed statement that Deputy Attorney General Katzenbach enclosed with his letter was not included in the government appendix where the letter enclosing the statement is printed. Govt. Br. at 1a-3a. We have requested the Solicitor General's office to confirm the fact that the President in fact issued the statement as pro-

(Footnote continued next page)

not only understood the difference in the thrust and coverage of the two statutes, he also fully understood that President Kennedy's statement dealt only with the mandamus portion of the Public Law. His memorandum to the U.S. Attorneys indeed included the full text of President Kennedy's statement

Since the Katzenbach memorandum totally destroys the argument that damage actions are not covered by Section 1391(e), the only explanation the Department of Justice can come up with about its own memorandum is that it is "wrong" (Govt. Br. at 49 n.34).

Mr. Katzenbach well understood that there were two distinct statutes involved

(Footnote continued)

posed to him by Mr. Katzenbach. As of the time of the printing of this brief, the Solicitor Generals office has not been able to locate the proposed statement but it seems obvious that Mr. Katzenbach presented the statement as the President issued it.

and therefore did not make the error that the Second Circuit did. Thus, there is nothing inconsistent about the paragraph which is contained in all three committee reports concerning the venue problem in actions "against a Government official seeking damages from him" (House Report No. 536 at 3; House Report No. 1936 at 3; Senate Report No. 1992, U.S. Code and Admin. News 2784 at 2786)(emphasis added) and the statement in the same reports that the statute was intended to apply to "actions which are in essence against the United States." (House Reports, supra at 3-4, Senate Report, supra at 2786). They become inconsistent when one reads something into the reports which is not there. The Second Circuit in Blackburn does just that.

> Moreover, both the House and Senate Reports emphatically note the qualification that section 1391(e) was intended by Congress to apply only

> to "actions which are in essence against the United States" (citation omitted) Blackburn, supra, Pet.Supp. Br. at 8A (emphasis supplied).

The word "only" is an addition by the Second Circuit. The Second Circuit once again makes that same error later in its Blackburn opinion, Id. at 10A. It does this in an attempt to explain away what it calls the "somewhat troublesome," (Id. at 10A), paragraph in the House and Senate Reports about "seeking damages from him" (a government official). The House and Senate Reports do not qualify the statement about actions in essence against the United States by saying the statute applies only to such actions. "Only" is a word which the Second Circuit supplied. After the court-supplied "only" is eliminated, the two statements become complementary. Both statements make sense as relating to two

distinct statutes.[8/]

Petitioners and the Second Circuit in Blackburn gloss over the fact that the Public Law was dealing with two separate and distinct issues in the same bill and Petitioners' position leads to the conclusions that:

(1) Congress did not intend to include damage actions although it deliberately added language encompassing damage actions to the proposed bill after it had been warned that the language would indeed encompass personal damage suits against government officials.

(2) Three Deputy Attorney Generals and a Justice Department spokesperson (Mr. MacGuineas) were wrong when they said personal damage actions against government officials were possible, i.e. that the four Justice Department officials were ignorant about the state of the law at the time.

(3) Deputy Attorney General Katzenbach was wrong in his statement that Section 1391(e) applied to personal damage actions

8/ See discussion Resp. Main Br. at 76-77, 76 n.25 that the public bill had more than one purpose, and discussion Id. at 95-98 of Congress's use of "in essence against the United States."

against government officials.

(4) Deputy Attorney General Katzenbach gave conflicting advice to President Kennedy from that which he gave to United States Attorneys around the country.

(5) That the House in two Reports and the Senate Committee in its Report included the paragraph indicating that the statute covers suits seeking damage from federal officials for actions taken without legal authority when they did not intend to cover such suits.

(6) That Congress rejected Deputy Attorney General White's suggestion as to how to prevent the statute from covering personal damage actions against federal officials while acting on almost all his other suggestions, but still did not intend to cover damage actions.

(7) That Congress chose narrow language for Section one (Section 1361) and broad language for Section two (Section 1391(e)) but intended the broad language to be interpreted narrowly.

(8) That Congress intended "civil actions" as used in Section 1391(e) to have a different meaning than "civil actions" as used in Section 1391(a) and 1391(b).

II

THIS COURT'S SCHLANGER V. SEAMANS FOOTNOTE DOES NOT REQUIRE THE RESULT REACHED BY THE SECOND CIRCUIT IN BLACKBURN.

The Second Circuit in Blackburn, (Pet.

Supp. Br. at 9A) refers to footnote 4 in this Court's opinion in Schlanger v. Seamans, 401 U.S. 487, 490 n.4 (1971). Schlanger involved a habeas action which traditionally presents unique venue issues and the footnote is plainly obiter.

More important is the fact that at the time this Court wrote its opinion in Schlanger there had not been presented to it (exactly as there had not been presented to the Second Circuit in TVA) all of the legislative history we have outlined above. It is not difficult to trace what part of the legislative history was before this Court at that time.

The government brief in Schlanger includes only the following discussion of legislative history:

> In any event Section 1391(e) does not affect the jurisdiction requirements for habeas corpus. It was enacted expressly "to make it possible to bring actions against Government officials and agencies

in the U.S. district courts outside the District of Columbia, which, because of certain existing limitation on jurisdiction and venue, may now be brought only in the U.S. District Court for the District of Columbia" H. Rep. No.536, 87th Cong. 1st Sess., p.1, S.Rep.No.1992, 87th Cong.2d Sess., p.2 and see 107 Cong.Rec.12157, 108 Cong.Rec.18783,20093-20094. Gov't Br. in Schlanger at 31-32.

Footnote 4 in Schlanger refers only to the specific items as they appear in the Government brief. The Court did not have the benefit of adversary briefing on legislative history since Petitioner was pro se.

This Court's obiter reference in Schlanger was made without consideration of critical features of legislative history which were thereafter revealed. Although the Schlanger footnote statement is in error and merits remedial explanation, this Court does not have to overrule Schlanger in order to adopt Respondents' positions since as we explain

in Respondents' Main Brief at 49-50, the special nature of habeas takes it out of the rules applicable to civil actions generally.[9/]

III

THE SUPPLEMENTAL BRIEF FOR PETITIONER FAILED TO DEAL WITH ALL OF THE BLACKBURN OPINION.

The Petitioners in Point II of their Supplemental Brief claim that Section 1391 (e) as construed by the Court below and by the First Circuit in Driver, supra, is unconstitutional. Petitioners fail to even mention that the Second Circuit in Blackburn (Pet.Supp.Br. at 15A n.12) said it saw no constitutional infirmity in the result reached by the District of Columbia in this case and by the First Circuit in Driver.[10/]

9/ This Court in Harris v. Nelson, 394 U.S. 286,293-294 (1969) said the labe of "civil" for habeas proceedings is "gross and inexact."

10/ The Petitioners also fail to mention that the Second Circuit in the same footnote "agree[s] with the two circuits which have addressed the issue and held that, in authorizing service of process by certified mail beyond the boundaries of the forum state, Congress intended to provide a source of nationwide in personam jurisdiction in suits where venue is established under section 1391(e)."

CONCLUSION

The judgment of the Courts of Appeal should be affirmed.

RESPECTFULLY SUBMITTED,

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